STATE OF VERMONT

SUPERIOR COURT WASHINGTON UNIT	)	CIVIL DIVISION DOCKET NO. 171-3-19 Wncv
Vermont Journalism Trust, *Plaintiff* v. Vermont Department of Corrections, Mike Touchette, Commissioner of the Vermont Department of Corrections, *Defendants*	)	

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

After meeting and conferring to discuss Plaintiff's motion to compel in the above-captioned matter, the parties' filings were renewed. The parties agreed that the Department could supplement its initial memorandum due to the brief period between Plaintiff's motion being filed and the initial hearing on the matter. The Department offers the following supplemental memorandum in opposition to Plaintiff's motion.

SUPPLEMENTAL MEMORANDUM OF LAW

Plaintiff, having received a Vaughn index now seeks even further disclosure. Plaintiff's attempt to execute the statutorily enshrined privacy rights of state employees through a "death by one thousand cuts" approach should be rejected. Plaintiff's request is so narrowly tailored that by its very terms, disclosure of any information (and certainly any further information) implicates the protected privacy interests of state workers. Briefing on the merits accompanied by affidavits from

appropriate officials and, if necessary, in camera review properly balances the interests of the parties.

As a general matter, the Vermont Supreme Court has already indicated that whether records of "disciplinary action, performance evaluations, or employee grievances contain 'personal' information within this exception is a fact-specific determination." *Norman v. Vermont Office of Court Adm'r*, 2004 VT 13, ¶ 9, 176 Vt. 593, 844 A.2d 769 (2004) (citing with approval numerous other courts who have held such records to be exempt). Undersigned counsel can locate no cases in Vermont arising from similarly narrow requests for private records with stigmatizing connotations. However state and federal decisions hold that "there are occasions when extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed." *Lykins v. United States Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984). In these circumstances, there are preliminary procedures that may be employed before the responding agency is prejudiced by disclosure of potentially protected information. *See, e.g., Wadhwa v. Sec'y United States Dep't of Veterans Affairs*, 707 F. App'x 61, 64–65 (3d Cir. 2017) (holding that VA "properly refused to confirm or deny the existence of employee disciplinary records" and that affidavits and in camera review were appropriate alternative to public disclosure); *see also, Norman v. Vermont Office of Court Adm'r*, 2004 VT 13, ¶ 9, 176 Vt. 593, 844 A.2d 769 (2004) ("Numerous courts have held, similarly, that employment performance evaluations or disciplinary records, even if favorable, may be "highly offensive" and therefore properly withheld." (citing *Young*

v. Rice, 308 Ark. 593, 598, 826 S.W.2d 252, 255 (1992); *Dawson v. Daly*, 120 Wash. 2d 782, 796–97, 845 P.2d 995, 1003–04 (1993); *Criminal Justice Comm'n v. Freedom of Information Comm'n*, 217 Conn. 193, 585 A.2d 96, 100 (1991); *Bradley v. Bd. of Educ. of Saranac Cmty. Schs.*, 455 Mich. 285, 565 N.W.2d 650, 660 (1997); *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236, 1240 (1977); *Pawtucket Teachers Alliance v. Brady*, 556 A.2d 556, 559 (R.I.1989) (all cases holding that disciplinary, evaluative, or employment grievance records are exempt from public disclosure)). Thus, this case involves records of a type frequently held exempt from public disclosure and is in a posture where other courts do not necessarily require more public disclosure. The Department's concerns are not academic. As will be more fully detailed in the briefing on the merits, allowing public disclosure of personal information presents considerable operational and security concerns by making the hiring and retention of staff more difficult, and creating new mechanisms for inmates to harass, coerce, or threaten DOC staff.

The Department is asking the Court to deny Plaintiff's motion and schedule briefing on the merits. By contrast Plaintiff asks the Department to disclose confidential information first, then explain why it should be withheld. The Court should have full insight into the facts and legal issues *before* requiring irreversible disclosure of confidential information. Summary judgment process will allow the Department to explain its rationale publicly, and to attach appropriate affidavits and exhibits. Plaintiff will then have the opportunity to attack the Department's

submission as insufficient or legally flawed, or to frame some argument for greater disclosure before responding.

For the foregoing reasons this Court should deny Plaintiff's motion to compel.

Dated at Waterbury, Vermont this 14th day of October, 2019.

Respectfully Submitted,

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ATTORNEY GENERAL

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